No. 93-1308

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HERMAN CORN, Trustee,
Petitioner,
vs.
THE CITY OF LAUDERDALE LAKES, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

INTRODUCTION

The related questions presented by Mr. Corn's Petition for Certiorari focus on a federal court's obligation to give full faith and credit to final state court judgments and preclusive effect to state court factual findings. In land use regulation cases, this is particularly important because this Court's mandate in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), requires that a state court judgment be secured on state law remedies before damages are sought in federal court. Mr. Corn demonstrated that the August 13, 1993 Eleventh Circuit opinion (Opinion) not only failed to meet that requirement but virtually defied the holding of *Allen v. McCurry*, 449 U.S. 90, 95-98, 105 (1980). In its March 18, 1994 Brief in Opposition (Opp.), Respondent City of Lauderdale Lakes (City) dealt with this central thrust of the Petitition by ignoring it altogether: neither the existence nor the import of *Williamson County* is so much as acknowledged.

The Opposition's omissions are more revealing than its contents. It also fails to address other matters central to Mr. Corn's presentation: (1) the consequences of the fact that the "sudden and unexpected" (App. G12-13) July 12, 1977 City Council ordinances, which stripped Mr. Corn of his vested rights, had no evidentiary basis whatsoever and were enacted in violation of state law as well as the City's own mandatory procedures; (2) the proliferation of NIMBY-driven official acts which sacrifice citizens' basic rights and the most rudimentary elements of due process on the altar of political expediency; and (3) the need for this Court to bring order into the shambles that is substantive due process land

use law.[1] And, as explained *post*, the City misses the point on some of the matters it does address. The City's unwillingness — indeed its inability — to grapple with these issues only underscores the appropriateness of certiorari.

II

THE ELEVENTH CIRCUIT OPINION FRUSTRATED THE APPARENT INTENT UNDERLYING THE PROCEDURES THIS COURT PRESCRIBED IN *WILLIAMSON COUNTY*, AND COMPELLINGLY DEMONSTRATES THE NEED FOR THIS COURT TO REVISIT THAT CASE

Under the *Williamson County* matrix, a landowner desiring to pursue his Fifth Amendment and Civil Rights Act (42 U.S.C. §1980 *et seq.*) damages remedies for unconstitutional land use regulation, must first "seek compensation through the procedures the state has provided for doing so" to enable the state action to be "complete" (473 U.S. at 194-95). State courts are assigned a dual role. *First*, they are *official arms of a state* whose final action "ripens" a constitutionally-based claim by enabling federal courts to tell whether the challenged regulation went "too far." *Second*, they perform the *adjudicative function* of determining whether the claims or defenses have merit.

Mr. Corn did exactly what *Williamson County* requires only to have his hard-won state court judgment ignored by a

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[1] This disorder has not gone unnoticed. In 1992, after an attempt to reconcile the clashing positions of the various circuits, the Sixth Circuit simply threw up its hands, saying that "the conflicts among circuits are too great. Harmony will have to await action by the Supreme Court." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1220 n.45 (6th Cir. 1992).

Circuit Court which envisioned itself as speaking to larger issues "beyond the fisc of one Florida community and the merits of one case" (*Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1373 (11th Cir. 1993); App. A7). The Eleventh Circuit simply disregarded the preclusive state court final judgment (and soundly-based state court and Federal District Court factual findings as well) and assumed the role of a court of first instance. (See Pet. 15-17 for particulars.) The Opinion's message, that federal courts are free to ignore state court judgments, is a recipe for an astonishing waste of judicial resources: why require a detour to a state court if there is no purpose served by its adjudication?

The implications and ramifications of this issue are significant. A decision of a Federal District Court in California (filed virtually simultaneously with Mr. Corn's Petition) illustrates the resultant confusion. In that case, the landowner did not prevail in state court. But once in federal court pursuant to *Williamson County*, it was told that it was barred by *res judicata* "from ever pursuing its federal claim in federal district court. Thus, the plaintiff asserting a taking in violation of the United States Constitution will never gain redress in the federal courts, unless, of course, it successfully petitions the United States Supreme Court for a writ of certiorari." *Hayward Exchange, Inc. v. City of Oakland*, 1994 WL 46841, *4; 1994 U.S. Dist. Lexis 1421, *11 (Feb. 10, 1994; Caulfield, J) Thus, developing law suggests that the act of ripening a land use case in the manner directed by this Court in *Williamson County* also destroys it.[2]

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[2] *Hayward Exchange* specifically identified a direct decisional conflict on this point between Ninth Circuit decisions like *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993) and *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1052 (1994) and the Eleventh Circuit case of *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992). One focus of these and related cases, such as *Peduto v. City of North Wildwood*, 878 F.2d

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The lower courts' implemention of *Williamson County* is in startling disarray. If, as here, a landowner can faithfully follow the path etched by this Court only to have his favorable state court final judgment simply ignored by a federal court in a subsequent federal action, compliance with *Williamson County* becomes a total waste of time. And if, as in *Hayward Exchange*, a landowner who is unsuccessful in the *compelled* state court action is told that his federal claims will *never* be cognizable in a federal court, *Williamson County* is mocked. Either scenario represents an abdication of the historic function of the " 'independent' federal courts" as "guardian" of the protections "rooted in the Bill of Rights.' " *Chapman v. California*, 386 U.S. 18, 21 (1967) (quoting James Madison, 1 *Annals of Cong.* 439 (1789)).[3]

(fn. continued)
725 (3d Cir. 1989), is whether a landowner might secure his right to a federal adjudication by a reservation of issues under *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964), usually used in cases of abstention under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) or *Younger v. Harris*, 401 U.S. 37 (1971). But *Allen v. McCurry*, 449 U.S. at 101 n.17, states that *England* abstention can be invoked only in the first instance (*see England*, 375 U.S. at 415). The landowner's dilemma can be simply stated: how does he or she simultaneously file in state court first in order to comply with *Williamson County*, and in federal court first to comply with *England*?

[3] Neither the Opinion nor Ninth Circuit cases on which *Hayward Exchange* relied reconcile with a series of consistent pronouncements of this Court. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967), contains this charge to the federal judiciary:

> Congress [in 1871] imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims . . . 'We yet like to believe that wherever the federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because

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III

THE ELEVENTH CIRCUIT OPINION PATENTLY VIOLATES THE LAW OF THIS COURT AS TO COMITY, PRECLUSION AND FULL FAITH AND CREDIT

Even if the City's claim that the substantive due process question the Opinion addressed is qualitatively different than what the state courts decided (a dubious proposition), the City is still wrong on its claim that there was no full faith and credit lapse.[4] The City asserts that Mr. Corn was required to prove, and failed to prove, "that 'the City's actions in blocking development were arbitrary and capricious, lacking adequate public purpose.' " (Opp. 16). *But the state courts found that the City failed "to follow its own notice*

(fn. continued)

> the rights asserted may be adjudicated in some other forum.' (quoting in part from *Stapleton v. Mitchell*, 60 F. Supp. 51, 55 (D. Kan. 1945)).

And the admonition of this Court in *England*, 375 U.S. at 417, should not be forgotten:

> The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.

[4] This City is also wrong in its suggestion that a vested right in Florida is no more than a vague equitable presumption. (Opp. 14-16) A vested right is exactly what its name states: a right that is vested, *i.e.*, cannot be taken away by government without compensation. (See Pet. 18.) The extended commentary on what the City did as opposed to what Mr. Corn did is semantic sophistry which changes nothing: the City performed a series of acts, starting with its promises at the time of annexation on which Mr. Corn could reasonably rely, and in reliance he changed his position in ways "of such magnitude and character that it would [have been] grossly unfair" (App. G16) to permit the City to renege.

and procedure requirements" and "acted not in accordance with the requirements of City charter" but rather in response to "demands of . . . residents without consideration for the rights of Plaintiff," that the July 12 ordinances were void and uneforceable, that the City made no showing that these ordinances were enacted for "public health or safety" or any other "compelling reasons," that Mr. Corn had acquired vested rights to build the project, and that the City could not change the zoning and had no remaining discretion other than in insuring technical site compliance. City of Lauderdale Lakes v. Corn, 427 So.2d 239, 240-44 (Fla. 1983); App. D5-11, G17. (Emphasis added.) What more could the Florida state courts have said? What more is there to prove?

The Eleventh Circuit made no effort to "work around" the state court findings. It called District Court findings which did no more than echo the state court judgment "clearly erroneous" (997 F.2d at 1385; App. A40), and made its own findings which contradicted preclusive state court findings: *inter alia*, that the City council did not abuse its discretion, that the July 12, 1977 ordinances were valid, and that its actions were "substantially related to the public welfare." (997 F.2d at 1392; App. A3-4, 8, 40, 53) But none of these issues were before the Eleventh Circuit; *they had all been finally adjudicated in the state courts.* The City's position is inexplicable. It suggests that if a court can change a legal-theory label, it can start anew with a factual *tabula rasa* — even on appeal.[5] At the very least, the City demonstrates a

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[5] Along the way, the City attempts to poison the well with several diversionary *ad hominem* attacks:

First, the City implies (Opp. 2) that the annexation agreement created no rights of consequence in Mr. Corn. But the annexation was voluntary, and the agreement authorized the project and created a vested right. (See Pet. 4.)

Second, the City suggests (Opp. 4) that Mr. Corn did not properly respond to City suggestions for project modificiations. The record, however, shows the opposite (App. G7), forcefully in the

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fundamental misunderstanding of issue preclusion. *See Allen v. McCurry*, 449 U.S. at 101.[6]

IV

THE CITY'S SUBSTANTIVE DUE PROCESS ANALYSIS IS OFF TARGET

The City notes correctly that the Eleventh Circuit attempted to resolve the substantive due process issue by reference to a two-prong test of *Rymer v. Douglas County*, 764 F.2d 796, 801 (11th Cir. 1985), which focuses on "whether the [governmental] deprivation . . . is the result of an abuse of governmental power sufficient to raise an

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(fn. continued)
Planning and Zoning Committee's project approval.

Third, the City accuses Mr. Corn of misrepresenting that there was a pre-1977 state court judgment ordering the City not to change the zoning on the Property. (Opp. 7) But 1970 and 1971 judgments (App. E2, 7) do preclude zoning changes on the larger site which includes the Property. The language quoted at G15 from a subsequent decision is thus at odds with the actual orders in the earlier action.

Fourth, the City sees ominous portents in Mr. Corn's filing an action for damages in Federal District Court instead of pursuing his right to build. (Opp. 8-9) There are obvious reasons for this: the plat-requirement roadblock and the fact that the City's illegal acts closed the window of economic opportunity (see Pet. 6, 28) are two. And even if Mr. Corn had built, he was still entitled to temporary taking damages. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

[6] Since the Petition was filed, yet another Circuit Court of Appeal decision has stressed the compelling "principles of comity and repose embodied in [28 U.S.C.] § 1738." *Morgan Stanley Mortgage Capital, Inc. v. Insurance Commisioner of the State of California*, 1994 WL 70245 *4, quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 462 (1982).

ordinary tort to the stature of a constitutional violation." (Emphasis added.) But this is obviously the wrong test; it speaks to *torts*, and "ordinary" torts at that, not violation of self-executing constitutional rights. Further, conceptual problems aside, it was wrongly applied, since the Opinion did not give the required preclusive effect to the state court finding that the July 12, 1977 ordinances were not supported by legitimate public health, welfare, safety or morals concerns. The subjective spin the Eleventh Circuit put on substantive due process law, requiring an "improper motive" as a *sine qua non* of liability (see Opp. 22), is also at odds with the law of this Court, which precludes inquiry of public officials as to motive, and declines to strike down exercises of power on the basis of wrongful motive (*United States v. O'Brien*, 391 U.S. 367, 382-83 (1968)).[7] Finally, the City makes no effort to address the uniformly acknowledged decisional chaos among the circuits.[8]

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[7] But even on the City's premise, Mr. Corn secured an eminently correct District Court finding that "the City Council was motivated solely by an irrational desire to thwart CORN's plans." (771 F. Supp. 1557, 1569; App. B22) But the Eleventh Circuit, of course, repudiated the District Court and wrote its own factual scenario. (997 F.2d at 1342; App. A53)

[8] At Opp. 20 n. 7, the City sidesteps address of the problems with the construct the Eleventh Circuit promulgated in *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). *Eide* classifies all cases challenging land use regulations into four pigeonholes, ignoring the teachings of this Court that these cases are highly fact-sensitive and thus inherently disorderly. Thee City's claim that the *Eide* construct was not central to the disposition of this case is simply wrong. The Opinion quotes the construct in its entirety and states that "[s]ubject to those four [*Eide*] limitations, the constitution does not prevent a local government from restricting, controlling, or limiting the development of land . . ." (997 F.2d at 1379; App. A8-9) and then segues into one of the four *Eide* categories, and analyzes the matter consistent with the imperatives of that category. This use of the construct for threshhold

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There is a significant need for this Court to define the elements and parameters of substantive due process law in the land use area. Extant "takings" law does not address the questions raised. A focused explication by this Court will affect savings in court and litigant resources, and greatly reduce the present level of aggravation.

V

CONCLUSION

Rather than confront the actual issues, the City opts for innuendo, insinuation, diversion, massive denial and selective reportage. It aims to persuade that (in spite of a quarter-century of litigation and eight reported opinions) this is a garden-variety case presenting nothing out of the ordinary, and is not even particularly interesting. Not so. The issues raised are significant; the problems they encompass are recurring and have generated radically confusing and conflicting decisions among the circuits. Also present is a gross injustice: as the state courts repeatedly recognized, massive damage has been done to Mr. Corn by a government insensitive to both his rights and its own commitments. It is bitterly ironic and immoral to permit the perpetrator of such conduct to find safe haven in federal courts, whose primary function is to protect the constitution, not its violators.

(fn. continued)
classification is how it is designed to be used. Particularly revealing is that *while the City makes a strenuous effort to insulate itself and the Opinion from Eide, it makes no effort whatsover to defend the construct as consistent with the law of this Court, or to show that this Court's examination of the construct would be unnecessary.*

The Eleventh Circuit has issued an Opinion that is, with respect, almost contemptuous[9] of the standards of comity, full faith and credit and preclusion as they have developed in this Court. The Petition presents an opportunity to restore decisional harmony in important and intensely litigated areas of the law. Certiorari is appropriate, and respectfully urged.

DATED: March 28, 1994.

Respectfully submitted,

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[9] "Contemptuous" may seem to be strong language, but a distinguished federal jurist recently noted that citizens who bring land use cases into federal court sometimes receive "thinly disguised contempt from members of the judiciary." *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1346 (9th Cir. 1990), Kozinski, J. dissenting, *rev'd*, 938 F.2d 153 (1991). These citizens deserve better. Mr. Corn deserved better.